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SEP 18 2003

STATE OF NEW HAMPSHIRE

WATER COUNCIL

03- 14 WC

DOCKET NO. _____

APPEAL OF GERALD A. BELL

NOW COMES GERALD A. BELL OF 701 Old Homestead Highway, Swanzey, County of Cheshire and State of New Hampshire and says as follows:

1. That for the past twenty one (21) years, Gerald A. Bell has operated a septage facility at his premises located on Whitcomb Road in Swanzey, New Hampshire (NHDES Site #198405066-S-001).

2. That the previously existing groundwater permit expired on May 20, 2003.

3. That effective as of May 5, 1999, while Gerald A. Bell was operating his septage facility under the previously issued groundwater permit, the Department of Environmental Services adopted Env-Ws1607 entitled "Site Permit Requirements" thereby adopting substantially different requirements then had previously existed in the State of New Hampshire.

4. That nowhere in Env-Ws 1607 is there any reference to the manner in which pre-existing, properly permitted septage facilities were to be re-licensed in view of the newly adopted rules.

5. That for 21 years, Gerald A. Bell, has made a substantial financial investment in his septage facility in order to meet all state requirements applicable to that facility.

6. That as reflected in the Septage Facility Permit Application initially received by DES on April 25, 2003 and as revised on June 9, 2003, the existing abutter's (Richard Cote) property line is 85' feet southerly of the existing septage lagoons on the Gerald A. Bell property.

7. That Env-Ws 1608.08(f) mandates a buffer distance of five hundred (500') feet from the septage facility to a property line unless, pursuant to Env-Ws 1608.08(g)(2), the abutter's written consent is obtained to permit a shorter distance.

8. That as it pertains to this application, the abutter, Richard Cote, has refused to give his consent to a reduced buffer.

9. That as a result, Gerald A. Bell, pursuant to Env Ws1610.01, made application to the New Hampshire Department of Environmental Services, Water Division, Residuals Management Section ("DES") for a waiver of the buffer requirement set forth in Env-Ws 1608.08(g)(2).

10. That by letter dated August 19, 2003, DES denied the application for a waiver submitted by Gerald A. Bell.

11. That a copy of this decision is attached hereto.

12. That Gerald A. Bell is aggrieved by the attached decision in that:

A. The rules adopted by DES do not address, in any fashion, how a pre-existing, properly permitted septage facility can be re-licensed when the pre-existing facility can't possibly comply with the newly adopted requirements.

B. That the 500 foot buffer distance from a property line is arbitrary and capricious with there being no justification for it in scientific fact.

C. That Paragraph 16 of the DES decision dated August 19, 2003 states, in part, that "[t]he abutter's refusal to allow a lesser buffer distance is the exercise of a right explicitly granted to the abutter in the Septage Rules. This right is important to assure that the abutter **accepts the increased likelihood of nuisances arising from operation of a septage facility at a reduced buffer distance.**" Emphasis added.

D. That this portion of the decision of a clear reading of Env-Ws 1608 make it clear yet again that they apply to the creation of a brand new facility after the current rules were adopted with their being no rule to deal with pre-existing facilities.

E. That as to the facts as they pertain to this application, the abutter in question, Richard Cote, has owned his vacant real estate since October 13, 1981 with his deed being recorded in Vol. 1008, Pg. 656 of the Cheshire County Registry of Deeds. See copy of this deed attached hereto.

F. That for the entire 21 year period of time that the existing septage facility has been in operation in strict accordance with the requirements of DES, Richard Cote was, in fact, the abutter from who no consent was required.

G. That, in fact, for the entire period of the existence of the existing facility, Richard Cote has known of the "nuisances from operation of a septage facility" since it has been his neighbor since day one.

H. That the requirement to obtain the abutter's consent to a reduced buffer distance has permitted the abutter to seek unfair and exorbitant compensation from the applicant in exchange for that consent.

I. That while DES might think the abutter's "right is important to assure that the abutter accepts the increased likelihood of nuisances arising from operation of a septage facility" in reality the rule permits an abutter to take unfair advantage of an operator of an existing septage facility.

J. That as reflected in the Septage Facility Permit Application, testing has indicated that groundwater movement in the area of the existing facility is to the north northeast which is away from the Cote property.

K. The applicant puts his 21 year record of compliance with DES requirements before the Water Council with the suggestion that to now punish him and to cause him to lose the benefit of a substantial investment made in compliance with prior rules of DES is neither fair nor equitable.

L. That but for the buffer requirement issue, DES has not raised any other substantial technical issues with the Septage Facility Permit Application before them.

M. That the applicant provides a valuable service to inhabitants of Cheshire County who will be substantially inconvenienced if the applicant is forced to close his septage facility which would result in increased dumping at the City of Keene Waste Water Treatment facility where septage can be off loaded only during certain hours during non-holiday weekdays.

N. That due to the nature of the septage haulage business, it is beneficial to the applicant, and to the members of the public who he serves, to be able to pump and remove septage from customer's property on days and at hours where the City of Keene's facility is not opened all of which will be impossible unless the applicant can continue to use his septage facility.

WHEREFORE Gerald A. Bell respectfully prays as follows:

1. That the Water Council take jurisdiction of this appeal and schedule a hearing hereon.
2. That the Water Council, after hearing, grant to Gerald A. Bell a waiver, pursuant to Env-Ws 1610.01, of Env-Ws 1608(g)(2) so that his pre-existing septage facility may be re-licensed notwithstanding the fact that said septage facility is located eighty five (85) feet from his southerly boundary with Richard Cote.

3. For such further and other relief.

September 17, 2003

COPY
Gerald A. Bell

Legal Name And Address Of
Person Seeking Relief:

Gerald A. Bell
701 Old Homestead Highway
Swanzey, NH 03446

Counsel For Person Seeking
Relief:

Michael P. Bentley, Esq.
Lane and Bentley, P.C.
106 Washington Street, PO Box 472
Keene, NH 03431
(603)-352-5720

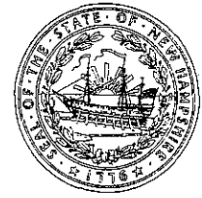


State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095

(603) 271-3503 FAX (603) 271-2982

August 19, 2003



Mr. Gerald A. Bell
701 Old Homestead Highway
Swanzey, NH 03446

Re: Application for Waiver of Septage Rules
Section Env-Ws 1608.08(g)(2)
Received April 25, 2003, Revised June 19, 2003

Mr. Bell:

The New Hampshire Department of Environmental Services, Water Division, Residuals Management Section ("DES") has received your revised application dated June 9, 2003 requesting to waive Env-Ws 1608.08(g)(2) of the *New Hampshire Septage Management Rules* ("the Septage Rules") requiring that a reduction to the 500-foot buffer distance between a facility and an abutting property owner's dwelling or property line can be obtained only with the occupant's prior written consent. Specifically, you have requested that DES reduce the required buffer distance from your septage lagoon to the nearest property line from 500 feet to 85 feet.

Pursuant to Env-Ws 1608.08, Facility Standards, paragraph (f), requires that "no person shall situate or operate a facility within the buffer distances specified in Table 1608-I." However, Env-Ws 1608.08(g)(2) provides that where distance to a dwelling or property line is concerned, a facility may reduce this distance by obtaining the occupant's prior written consent.

The purpose of the buffer distances is to provide a minimum level of protection to people and the environment against adverse effects and nuisances that may occur during operation of a septage facility.

Where an occupant is not available to give consent, the Septage Rules provide an alternative waiver mechanism for waiver of a specific requirement. Pursuant to Env-Ws 1610.01(d), Requirements for Waivers, DES "shall approve a request for waiver upon finding that" the proposed alternative: (1) is at least equivalent to the requirements in the Septage Rules; (2) is adequate to ensure that the provisions of RSA 485-A and RSA 485-C are met; and (3) protects human health, safety and the environment. However, Env-Ws 1610.01(e) precludes DES from granting any waiver that, in the judgment of DES, contravenes the intent of any statute or rule.



Where the occupant is available but has refused consent to waive the buffer distance requirement, as in this case, the abutter's refusal of implementation of a lesser buffer distance is the exercise of a right explicitly granted to the abutter in the Septage Rules. This right is important to assure that the abutter accepts the increased likelihood of nuisances arising from operation of a septage facility at a reduced buffer distance. This also insures that the right of the facility to operate, without the burden of undue nuisance complaints, is preserved.

In accordance with Env-Ws 1610.01, based on the following findings, DES has determined that reducing the required buffer distance from 500 feet to 85 feet contravenes the intent of RSA 485-A and the Septage Rules. Accordingly, your request to waive Env-Ws 1608.08(g)(2) is denied.

Findings

1. **RSA 485-A:1 Declaration of Purpose.** – The purpose of this chapter is to protect water supplies, to prevent pollution in the surface and groundwaters of the state and to prevent nuisances and potential health hazards. In exercising any and all powers conferred upon the department of environmental services under this chapter, the department shall be governed solely by criteria relevant to the declaration of purpose set forth in this section.
2. **RSA 485-A:4 Duties of Department.** – It shall be the duty of the department and the department is authorized: XVI-a. To regulate the removal, transportation, and disposal of septage through administration of a permit system. As a condition of any permit issued under this chapter, the department may require payment of a reasonable fee, established by rules adopted under RSA 485-A:6, X-a. Funds collected under this paragraph shall be deposited with the treasurer as unrestricted revenue.
3. **Env-Ws 1601.01 Purpose.** These rules establish standards, criteria, and procedures for a permit system to manage the removal, transportation, and disposal of septage in order to protect human health and the environment and to encourage beneficial reuse and recycling of septage with appropriate performance standards.
4. **Env-Ws 1604.02 Site and Facility Permits Required.**
 - (a) No person shall manage septage at any place which does not have:
 - (1) A site or facility permit issued in accordance with Env-Ws 800 or Env-Ws 1600;
 - (2) A wastewater treatment facility permit or groundwater permit issued under RSA 485-A:13; or
 - (3) A solid waste facility permit issued under RSA 149-M.



5. Env-Ws 1604.02 Site and Facility Permits Required.

(h) The permit holder of a groundwater permit for an existing facility, obtained in accordance with (a)(2) above, shall:

- (1) Comply with all applicable provisions of Env-Ws 1600, other than notification requirements, by the end of the groundwater permit term; and
- (2) Within 90 days of the effective date of the 1999 amendments to Env-Ws 800, submit a closure plan to the department for approval.

6. Env-Ws 1610.01 Requirements for Waivers

(d) The department shall approve a request for a waiver upon finding that:

- (1) The alternatives proposed are at least equivalent to the requirements contained in these rules;
- (2) They are adequate to ensure that the provisions of RSA 485-A and RSA 485-C are met; and
- (3) Human health, safety, and the environment shall be protected.

7. Env-Ws 1610.01 Requirements for Waivers

(e) No waiver shall be granted which, in the judgment of the department, contravenes the intent of any statute or rule.

8. The property located at Whitcomb Road (Tax Map 33, Lot 5), Swanzey, New Hampshire and owned by Gerald A. Bell contains existing septage lagoons located approximately 85 feet north of the south property line.
9. The septage lagoons are currently operating under a groundwater permit (No. 198405066) that expired on May 20, 2003.
10. During a site visit to the lagoon facility on September 17, 1999, DES verbally informed Mr. Bell and his son that when the groundwater discharge permit expired, compliance with all of the septage rules would be required.
11. In the cover letter to Mr. Bell's Closure Plan approval dated January 27, 2000, DES reminded Mr. Bell that if he intended to operate his facility after the expiration of the groundwater permit, a facility permit must be obtained in accordance with Env-Ws 1608.
12. Mr. Richard Cote is the owner of the abutting property, located immediately south of Mr. Bell's property.




13. Section Env-Ws 1608.08(g)(2) states that the distance to the nearest occupied dwelling or property line may be reduced below 500 feet with the occupant's (i.e., owner's) prior written consent.
14. In Section III.2 of the Application for Waiver, the applicant writes "Mr. Cote will not give written consent for the facility to continue to operate within 500 (feet) of his property line".
15. In a letter from Mr. Cote's attorney, Thomas R. Hanna, dated July 17, 2003, it is written that "Mr. Cote opposes the grant(ing) of any such waiver...".
16. The proposed alternative requested in the Application is to allow the lagoon to remain located 85 feet from the property line without approval of the abutter. DES finds this is not equivalent to the requirements contained in Env-Ws 1608(g)(2) and contravenes the intent of this rule. The abutter's refusal to allow a lesser buffer distance is the exercise of a right explicitly granted to the abutter in the Septage Rules. This right is important to assure that the abutter accepts the increased likelihood of nuisances arising from operation of a septage facility at a reduced buffer distance.

With the denial of this Application, the related Septage Facility Permit Application will not be deemed complete until a revised Facility Plan is submitted. The Facility Plan must show the proposed locations of all facility components, and the data to indicate compliance with all pertinent buffer distances in the Septage Rules.

Pursuant to RSA 21-0:7, you may appeal this decision to the Water Council by filing an appeal that meets the requirements specified in Env-WC 200 within 30 days of the date of this decision. Copies of the rule are available from the DES Public Information Center at (603) 271-2975 or at <http://www.des.state.nh.us/desadmin.htm>.

If you have any question, please contact me or Alexis Rastorguyeff, P.E. at (603) 271-7888, or Mr. Rastorguyeff via e-mail at arastorguyeff@des.state.nh.us.

Sincerely,


John R. Bush, P.E.
Administrator,
Wastewater Engineering Bureau

cc: file/db
Harry Stewart, P.E. – Director, Water Division
John Bush, P.E. – Administrator, WEB
Dick Flanders – Supervisor RMS
Alexis Rastorguyeff, P.E. – RMS

Know all men by these presents

That we, Roland Joseph Germain and Sandra C. Germain, husband and wife,
as joint tenants and not as tenants in common, with rights of survivorship,

of Wallingford in the County of New Haven and State of Connecticut,
in consideration of the sum of --ONE OR MORE-- dollars, to us in hand,
before the delivery hereof, well and truly paid by Richard Cote, single,

of Rt. #32, RFD #2,
East Swanzeey Cheshire New Hampshire
(Town or City) (County) (State)
the receipt whereof we do hereby acknowledge, have given, granted, bargained, sold
and by these presents do give, grant, bargain, sell alien, enfeof, convey and confirm unto the said Grantee
and his heirs and assigns, forever,—

Two certain tracts of land situate in SWANZEY, County of Cheshire and State
of New Hampshire, bounded and described as follows:

Tract #1. Beginning at the northwest corner of the within described property
at a pile of stones, being a corner of land now or formerly owned by Chester L.
Lane, M. C. Stone Estate and William Belding Estate;

thence southerly at or near a wire fence along land of William Belding Estate
to land now or formerly of Oscar Farr;

thence easterly along Farr land to land now or formerly of Mark Carleton;

thence northerly along wire fence on land of Mark Carleton to land now or
formerly of Chester L. Lane;

thence westerly along said Lane land to the place of beginning.

Containing 16 acres more or less.

Being the same premises deeded to Raymond L. Lane by Dwight S. Stone and
others January 2, 1931 and recorded in Vol. 448, Page 173 of the Cheshire Registry.

Tract #2. Also land in SWANZEY in said County of Cheshire and State of New
Hampshire and adjoining Tract #1 on the east, bounded and described as follows:

Beginning at a point on the westerly side of a thirty (30) foot road called the
"Lane Pit #1 Haul Road" leading from the Keene Sand and Gravel, Inc. Plant to
the Swanzeey Center to East Swanzeey Covered Bridge Road;

thence westerly about forty (40) feet to an iron pipe which is the southeast corner
of the Tract #1;

thence northerly about seven hundred (700) feet along an old wire fence and Tract
#1 to a point in or near the northeast corner of Tract #1;

thence southerly following the westerly side of the said "Lane Pit #1 Haul Road"
about seven hundred (700) feet to the place of beginning.

Containing .3 of an acre more or less.

Being the same premises conveyed to Raymond L. Lane by Howard H. Stone and

others, dated June 1970.

Being all of the premises conveyed to us, the said Grantors, by deed of Dwight E. Jennings, et al, dated August 25, 1970 and recorded in Vol. 820, Page 323 of the Cheshire County Registry of Deeds.



Being _____ of the premises conveyed to _____ the said Grantor _____ by deed of _____
dated _____ 19 _____ recorded in Vol. _____ Page _____ of the _____ Registry.

To Have and to Hold the said granted premises, with all the privileges and appurtenances to the same belonging, to the said Grantee and his heirs and assigns, to their only proper use and benefit forever. And we the said Grantors and our heirs, executors, and administrators do hereby covenant, grant and agree to and with the said Grantee and his heirs and assigns, that until the delivery hereof we are the lawful owners of the said premises, seized and possessed thereof in our own right in fee simple; and have full power and lawful authority to grant and convey the same in manner aforesaid; that the said premises are free and clear from all and every incumbrance whatsoever, except as herein stated.

And that we and our heirs, executors and administrators shall and will warrant the same to the said Grantee and his heirs and assigns, against the lawful claims and demands of any person or persons whomsoever

we and/or
And the subscribers wife husband of the Grantors, for the consideration aforesaid, do hereby release to the said Grantee all rights of curtesy, homestead, and other interests therein.

Witness our hands this 13th day of October
Anno Domini one thousand nine hundred and eighty-one.

COPY
John J. Kovacs
COPY
John J. Kovacs

COPY
Roland Joseph Germain
COPY
Sandra C. Germain

Connecticut
State of ~~New Hampshire~~ } The foregoing instrument was acknowledged before me this 13th
County of New Haven } day of October A.D. 1981, by
Roland Joseph Germain and Sandra C. Germain

COPY
Eileen M. Donovan
~~Notary Public~~
Notary Public.
My commission expires: 4/1/86

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9-52 A.M.
OCT 23 1981
CHESHIRE COUNTY
REGISTRY OF DEEDS